UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re Holocaust Victim Assets Litigation regarding the - Application of Burt Neuborne for counsel fees Doc. 53

In Re: *

HOLOCAUST VICTIM ASSETS * Case No. 96-CV-4849(ERK)

Brooklyn, New York
March 2, 2006

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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE EDWARD R. KORMAN
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Proceedings commenced at 4:30 p.m.)

(Appearances via telephone: Samuel Issacharoff, Robert Swift, Samuel Dubbin.)

THE COURT: Can you hear me now?

(Parties answer in the affirmative.)

Okay. We're on the record. I just want you to take your appearances now.

MR. DUBBIN: Sam Dubbin, D-u-b-b-i-n, for U.S. Survivor Objectors and the HSF.

MR. SWIFT: Robert A. Swift of Kohn, Swift & Graf, Philadelphia, PA, on behalf of the Settlement Class.

MR. ISSACHAROFF: Samuel Issacharoff, I-s-s-a-c-h-a-r-o-f-f, New York, New York, on behalf of Burt Neuborne.

THE COURT: Okay. I wanted to have this kind of -- this status conference to sort of give you my preliminary thoughts and figure out where we go from here.

First, a couple of procedural matters. I'm actually not happy with the way this thing is being briefed in the sense that I'm getting bombarded by memos, supplemental memos, final memos, correspondence. It's hard for me to keep track of what's been docketed, what hasn't been docketed, stuff comes by fax, by overnight mail. It makes things -- it makes it very difficult for me to deal with. I've got a pile of papers, you know, maybe eight inches thick in front of me.

What I would like from each of you is one brief in ten days, two weeks, whatever you want, that sets forth your position in one place, so that I don't have to go through a million pieces of paper to actually, you know, deal with this in terms of writing an opinion.

So you just tell me, do you want 10 days? You want 14 days? I just want one document from each of you.

MR. ISSACHAROFF: Fourteen days would be better for me, Your Honor.

THE COURT: Okay. No extensions.

MR. ISSACHAROFF: Yes.

THE COURT: The next is thing is that while I think most of the issues have been fully addressed, I think there's one issue that I think has to be addressed further by Mr. Issacharoff on the question of the issue of cost structure and whether or not that issue is relevant.

Mr. Issacharoff, you cited Blum v. Stenson, 465 US 886, for the proposition that it's essentially irrelevant. I don't agree that that decision is dispositive. Blum v. Stenson essentially turned on the specific legislative history of the Civil Rights Act. And I'm not -- I think one has to address whether or not, removed from that context, which, of course, also involved the situation where counsel was working for what amounted to a contingency fee since they wouldn't be paid otherwise, which is not the case here, whether that case is dispositive on the issue of what is a fair and reasonable hourly rate.

Since we agreed we did not agree on any particular hourly rate. The rate is one that's fair and reasonable, and I think I'd like to have additional briefing on that score. And it would useful to know to what extent when a law firm sets an hourly rate, whatever it may be, it takes into account overhead in fixing that rate. I was once a partner in a law firm, but that was a long time ago and I use the partner in quotes, so I was never involved in making decisions like this. So I'm not certain as to what the answer is, but it would be useful to know what that figure is and to have briefed the issue of its relevance in determining a fair and reasonable hourly rate.

In addition, in footnote 19 in Blum v. Stenson, the Court says and I think in language which does have some relevance here even though it's not a civil rights case:

"As we stated in Hensley, an earlier case, a request for attorney's fees should not result in a second major litigation. Parties to civil rights litigation in particular should make a conscientious effort where a fee award is being made to resolve any differences."

Now, there are what I would call here -- you might describe the objections and put it into two categories. One, is their specific complaints about particulars items that

Professor Neuborne billed for and those issues that relate to those, what I would call specific items, as opposed to a more a general attack on the fee application. I would like you to try and make an effort to resolve those yourselves. And the magistrate in this case is Jamie Ornstein(phonetic).

I've created a new -- by the way, that reminds me, I've created a separate docket number for this fee application because it's easier to administer. And it's easier to use the docket sheet to figure out what's been filed and not filed because the docket sheet in the main action is constantly being up -- cluttered is not the right word for it, but there are all sorts of orders being entered and it's often difficult even looking at the docket sheet to figure out.

It takes time to figure out what's been filed with respect to this issue and what's been filed with respect to other matters. So the new docket sheet is -- the docket number henceforth under which I would like you file papers is 06-CV-983.

Now, I believe that Professor Neuborne is entitled to legal fees here. I agreed with him that he would be entitled to legal fees.

So the next question -- although, as I said, we never spoke about a number. And I have somewhat of a different recollection of the chronology, but in my view it's not material. My recollection is that the conversation about counsel fees occurred after Mel Weiss and all the other lawyers filed their application for counsel fees in November, I believe it was, of 1999.

And sometime thereafter, I don't remember exactly when I focused on those applications. It wasn't until, I think, 2001 that we actually had a hearing on it.

But at some point, I told Professor Neuborne to tell Mr. Weiss that he could not ask for counsel fees with respect to his work in obtaining a settlement because he had expressly represented that he was not going to take any fee.

And Mr. Neuborne relayed that message to Mr. Weiss and Mr. Weiss said he understood. But he asked whether that applied to work that he had done afterwards that didn't involve his work in obtaining a settlement.

And I said that my view was different as to that. And at some -- either at that conversation or at some later conversation when it began to appear or had appeared that the work of Mr. Neuborne would be extraordinarily extensive and was going to be a major -- take major portions of his time, Mr. Neuborne asked me whether that, what I said with respect to Mr. Weiss in terms of post-settlement fees, was applicable to him as well and I said of course it was.

So that's my recollection and I -- because the application for counsel fees by everybody that I've been referring to was filed in November of 1999 and because I don't think I focused in on that immediately, my guess is that this conversation, which I just relayed, probably occurred sometime in 2000. So I just wanted to make that clear.

MR. SWIFT: Your Honor -- I'm sorry.

THE COURT: Go ahead.

MR. SWIFT: Well, Your Honor --

THE COURT: And it was clearly in my mind when I finally heard argument on the counsel fee application, I actually was -- in language Mr. Neuborne quotes in a lot of his filings, I eluded to the difference between counsel fees and approving a settlement and counsel fees in terms of work that was done post-settlement.

So, you know, that -- my overall view is that he's entitled to counsel fees.

Now, to the extent that you are arguing that he's entitled to nothing, we could have further argument on it. I don't agree with it and I'm ready to write with respect to it. But we can have -- I don't know whether you want oral argument or not, but my view is that I retained him.

And I wrote an opinion -- I don't whether I have it at hand -- in the summer of, I guess, it would have been 2004, outlining what I believe Mr. Neuborne's role was in this case fairly extensively. My law clerk is going to get me the cite. Originally, I didn't --

MR. ISSACHAROFF: Is that the September 2004 memorandum --

THE COURT: Right.

MR. ISSACHAROFF: -- Your Honor?

THE COURT: Right. And I outlined in some significant detail all of the work that Professor Neuborne had done and the contributions that he had made to the case.

And the contributions are not just in the -- in what amounts he obtained, which is not necessarily that relevant here since this is not a common-fund fee application.

But even Mr. Swift, if I remember in one of his letters correctly, acknowledges that that comes to -- acknowledges, concedes rather, that that comes to 20 million. But -- and his work on the tax exemption is also significant.

I know that you say, Mr. Swift, that Congress deserves the credit for it, but we all know that Congress doesn't just connect legislation without influence and without argument.

And it took some effort that not only benefitted the settlement fund by a minimum of 18 to 20 million as of today, but will continue to benefit it because we're still -- we still have income from the monies we have not yet distributed.

So for all I know that could add up maybe to 25 million before the case is over, just in what we've saved in taxes.

And it wasn't just the settlement fund that benefitted because that legislation that we obtained also provided that no one who received any payment as a result of the Swiss Bank settlement will have to pay taxes on it. So there was a substantial benefit to members of the class.

But beyond that, he was active in what I would call fending off and a great assistance in fending off efforts by people to get money from us. And I'm not including Mr. Dubbin, the efforts of HFSA, which is not to get money from us, but to have a reallocation of money that we had allocated.

But what I'm referring to is the application of the disability rights advocates, the Pink Triangle. And, of course, your application, Mr. Dubbin, along with the application of Mr. Weiss for counsel fees.

I haven't calculated how many millions of dollars was involved in those three applications, but all three resulted in no payment from the settlement fund.

Now, in the description that I give of Mr. Neuborne's role, I don't even know that it's adequate because I regarded him not only in kind of a general counsel to the settlement fund, but as an independent person, sort of the representative of the settlement groups. And made very few decisions that I thought had any kind of potential impact without consulting him.

And as you know because it's a matter of public record, Mr. Neuborne gave me his best views and I didn't always agree with them.

But I wanted them because I felt that Judah were too close and, you know, it was a relationship of judge and special master and I wanted somebody who was independent of that relationship.

And to an extent, he was also part of -- that involved in a sense even overseeing the administration of the fund.

I mean, just last month when he was at a meeting of the German Foundation, he went to Zurich just to review the work of the CRT and to -- at my request, just to see if everything was working and whether there were any particular problems that needed to be addressed.

So it was an extraordinary role that he played and I think he deserves to be paid for it.

Now, the case that I'm referring, which is a September 13th, 2004 order and it’s reported -- I'll give you the Westlaw citation, at the moment it's 2004 WL 3710212.

And so, for all those reasons, I believe that he --

my preliminary view, you know, subject to when I reread all of your comments and documents, you know, whatever is said there to persuade me. Otherwise, that's my basic view. He rendered extraordinary service. He's entitled to be paid a reasonable fee.

And to the extent that in your case, Mr. Dubbin, that is not your counsel fee case, but your case involving the allocation of funds, I believe that I was entitled to an adversarial defense of my position.

As you know, to a degree, I mean, this is now -- I'm talking about my recollection. He actually -- in the district court, he supported an allocation; I believe an immediate allocation of 50 million dollars. And he also, I could be wrong, and also supported a fee for you, both of which I rejected.

But on the assumption that you said he was not looking after the interest of the needier survivors in the United States who are members of the Looted Assets Class, I believe that it was reasonable for me to have an adversarial defense of that position. And I believe that he's entitled to be paid for that.

But we can, so that the record is clear, we can just figure out how much he's claiming for that and just leave it so that the, you know, so that there's a record of how much of this really involves the brief in that case.

So what -- you know, what I feel this leaves for discussion is what is a reasonable fee in this case and, as I told you, what issue in that regard I think needs to be addressed.

I'm not sure which category in terms of trying resolve issues this falls, but, you know, Mr. Neuborne did research instead of asking somebody else to do it.

And my own view is that someone with Burt's knowledge doing research would probably take 10 minutes to do it, an associate might take an hour and a half. And particularly working with Westlaw, since his knowledge of the area is so extraordinarily extensive and since he knows what to look for.

And my own experience in law firms is that a substantial amount of associate time, without experience, doesn't always -- is not always worth the money that clients are charged for.

So that's my view of that argument. I, myself, do my own research from time to time because I think I can do it faster than my law clerks. We even had a race this week or last week over one particular issue. And one of them was working from Westlaw and I was going to the books and I got the answer first.

So I don't -- and the final point that you raise, Mr. Swift, about, you know, other people willing to work for nothing. I don't believe that any lawyer in this case would have been willing to have him or his law firm donate 8,000 hours of time.

And that assumes -- and, of course, you've lectured me early on from the first time we met over how important it is to pay lawyers in terms of their performance. But I think that -- you know, I just lost my train of thought.

What did I say before I gave you a needle, Mr. Swift?

MR. SWIFT: I think, Judge, you were saying that nobody was willing to give up 8,000 hours --

THE COURT: Yes. And --

MR. SWIFT: -- to the administration for free.

THE COURT: Right. And I also think that there was no one of his ability, that even if they were willing to volunteer to do 8,000 hours, that I would have regarded as able as he was.

And the difference between Mr. Neuborne and somebody at a law firm is I have access to him all the time. I even remember one time when he was recuperating from open heart surgery, going up to his apartment really to pay him -- just to call to see how he was, and I brought him the Bergier report to read while he was convalescing.

So this was service, you know, of an extraordinary nature that I -- that was necessary, that was rendered, and ought to be paid.

As far as the notice issue goes, I don't really know how much you want to press this, whether this is really a serious issue to deal with, to deal with the issue of his legal fees in good faith or do you just want to use it as a way of, you know, impeding the operation.

My own view is that assistance that he's rendered to the administration of the settlement fund, post-settlement, was not covered by and it was not intended to be covered by the amendment to the rule. In part, because it doesn't make any logical sense. I pay people to assist in the distribution of money, it costs money to give out money. Particularly, in the way that we've been doing it.

For example, we've hired -- not huge amounts of money -- but we've had to hire lawyers in Switzerland once to give us advise about Swiss secrecy laws and another because there was problem with an employee who claims that she was fired and she shouldn't have been.

I mean, I hired a lawyer in Switzerland. Do I have to notice to the class? I don't -- it seems to me that when you're dealing with assistance, the settlement fund, there's no rational basis to single out lawyers for having -- giving notice to the class and not to single out every expense that's made to distribute the money.

And so it doesn't really make a lot of sense to me either in -- if you read the underlying purpose of the rule, which basically reflects a distrust of class-action lawyers.

It seems to me that to apply to the -- up to the time of final judgment, which was entered in this case a long time ago, and not to the phase where people are assisting in the administration of the settlement fund monies.

But alternatively, the question then becomes, even if you're right, what's reasonable? And I noticed that, I think it was in Mr. Dubbin's last filing, he suggests that we take an ad in three newspapers that are circulated in the Jewish community in the United States. Well, I don't know what that would cost, 50,000 let's say. I think it's $50,000 of wasted money.

MR. ISSACHAROFF: I cited a case involving Indians, the Native-Americans, wherein that case the Court said that there were three newspaper that serve that community.

THE COURT: Well, I know. But you see the -- if we -- I shouldn't say this because -- you know, I'm half-tempted to say, if that'll satisfy it, spend the money. But the truth of the matter is that is it's not enough because -- let me go back.

The most interested -- we're not back to square one here in terms of class notification. We're almost finished. We're finished with the refugee-class distribution. We're almost finished with the slave-labor distribution.

To the extent that the Looted Assets Class, which is probably the most directly affected since whatever I don't give out to the bank accounts I have already said I'm going to give to the neediest survivors. It's that class that's arguably the most interested class. But that class goes beyond simply the United States.

But the reason that I think that it's not necessary is as follows. Everybody from that class was represented by counsel in this litigation with respect to the allocation and disputes over the allocation of money to the Looted Assets Class.

Mr. Swift claims to represent the whole class, which I accept without argument for the purpose of this motion. But you represent the American survivors, not only individuals, but an organization, HSF USA, which is an umbrella group for large numbers of active survivors who would likely have an opinion on this issue.

The Israeli survivors are actually represented by a lawyer retained by the Israeli government, Arnold and Porter. I assume you're aware of this litigation; if not, you can serve them too.

But this was -- this has already received major media coverage both in the Jewish community in the United States and in the *New York Times*. And that *New York Times* article, if you Google, you go into Google under Google news, you'll find that it's gotten substantial coverage even outside of the United States.

MR. ISSACHAROFF: Your Honor, we just learned that it was covered in the Zimbabwe news.

THE COURT: Well --

MR. ISSACHAROFF: And I can't imagine a notice program that would get to Zimbabwe any other way.

THE COURT: Well, let me just finish. I lose my train of thought when I'm interrupted. The Russian-survivor community, which was represented by -- a brief was actually filed, an amicus brief was filed in a court of appeals by the joint distribution community on behalf of that group.

And that group is so poor and the amount of money that would likely inure to the benefit of any member of that group is from this -- if I paid the entire request, is so insignificant that I don't think we'd get anybody -- it wouldn't be worth the stamp. I don't know what it costs to send a letter from Russia to the United States. It could cost .50 cents, .75 cents. These people need food.

I mean, it's totally unrealistic to talk about spending money for ads to reach that community. But -- so that I think that while I had -- while it had initial -- some appeal to me that, you know, for $50,000 we'd get rid of this objection. I don't think -- I think the 50,000 is unnecessary because the American-survivor community is well aware of this.

In fact, I was in Los Angeles last week to speak to a group of survivors and they were aware it. They had read the *Times* article. I was surprised myself because of the fact that we were in Los Angeles and many people had -- were aware of it and had read the *Times* article. And I also meet with survivors regularly. I don't turn away people who ask for meetings with me.

And I know, as you elude to in one of your letters, Mr. Swift, that we know what the basic view of the survivor community is in general about paying lawyers. And that is a majority, if not an overwhelming majority, are opposed to it; so that including my having paid you.

So that we know that the sense of the survivor community is that they don't want to pay. They don't want lawyers to get paid. They would rather have them work for nothing, which, you know, I could understand that. I would like the people who represent me to work for nothing too. But I'm not going to -- I don't think I'm going to learn very much.

But the most important thing is that, in terms of the reasonableness of the notice, is that there are counsel here who are actively litigating in an adversarial context against counsel fees. So I'm not going to learn anything that I don't already know. And the legal arguments, every legal argument that could be made has been made except for the one that I asked Mr. Issacharoff to brief, which neither of you made.

But every argument that can be made is made, so it would be one thing if no one showed up here in terms saying don't give them the money. I'm talking about people who are prepared to litigate over it. That might be one thing, but it just seems to me to be a real waste of money that would yield next to nothing.

I don't remember -- we spent 25 million dollars on the original notice program. And I don't know -- I would shudder to try and figure out how much it cost for each response we got.

And I think that that's likely to happen here, so I believe, my own view, is that it's just totally -- it doesn't make sense why Congress would single out lawyers who render service to the administration of the settlement fund post-entry of judgment from anybody else who gets money for their assistance and say I have to give class notice.

But I'm basically a very practical person and if there was some way of dealing with this without wasting money, then like I said, my initial reaction to Mr. Dubbin's was maybe I ought to do it. But I decided on second thought that it was not adequate and would be a waste of money anyway. I'm willing to consider other reasonable proposals.

But for the reasons that I gave you, I think that this is an argument that is more of throwing up just any possible stumbling block to Mr. Neuborne's recovery rather than really, you know, a serious concern about the class not being aware of what's going on or being consulted. So that's my view on that issue.

Now, the hearing that you asked me to hold, this is what to get to the bottom line is, what are we going to have a hearing on? I'd like you to try and, you know, as I said we can divide the arguments over the fee into two requests. One, which goes to the issue of whether he gets anything at all and what is a reasonable fee.

And the other, dealing with objections to specific items, not all of which are without merit. And you can try and resolve those with the magistrate. And I'm going to issue a referral order of those particular issues because I'd rather try and resolve it.

And if you can't resolve it, I'm just going to refer it to him because -- you know, to have whatever kind of hearing has to be held on that.

So, but what kind of hearing -- where do we go from here? Do you want me to write an opinion essentially saying what I've told you? I'm not sure what kind of a hearing you want.

MR. SWIFT: Well, let me address that, Your Honor.

You've covered a wide swathe of issues. And let me, if I may, comment on a couple. Because as I understand it, Your Honor was making preliminary comments; you weren't making final rulings.

THE COURT: That's right.

MR. SWIFT: For example, on class notice, I'm not one to spend money unnecessarily, but I don't read the rule, which I think was a judge-made rule, the same way you do. It says, "Notice of the motion must be served." And I don't see in there any way of saying, gee, you know, in particular cases we don't have to do it because it's not cost effective, et cetera, et cetera.

THE COURT: Well, no, the rule is not -- the rule we're talking about is actually written into -- it's into the federal rules, but it does talk about what notice is reasonable. And what notice reasonable is what I've been -- aside from my view, that the kind of notice that you would have me give would be incredibly expensive and yield nothing that I don't already know or that we don't already have.

But I -- most of my comments were addressed to the reasonableness of the rule -- the reasonableness of the notice, number one, which is what the rule says. It mitigates the -- what I think was understood to be, you know, possibly incredibly costly effort with respect to the issue of counsel fees by requiring reasonable notice. And my comment about the post-judgment efforts not being covered really is based on two factors.

Number one, just read the reasons that were given by the advisory committee for the -- for putting in the notice requirement to begin with. And number two, it's sort of strange that it would single lawyers in the post-settlement administrative phase through a special treatment from anyone else. Now, did I have to give notice to the class before the people in the CRT consulted with counsel about Swiss --

MR. SWIFT: Your Honor, the rule states that fees for class counsel need to be served and noticed. It doesn't say the same thing about special --

THE COURT: The class was this -- I actually don't even know what class counsel means in the context of the post-settlement phase. It's essentially a meaningless title. I'm not even sure what class counsel means in that context. I mean, the case is over in terms of the action against the defendants. And, you know, it's basically a title if that. I even asked myself, what does this all mean? What is class counsel? Most of the class counsel in this case, other than Professor Neuborne, have done absolutely nothing since the case settled. I ask myself what is class counsel? It's a title right now. I could call him general counsel to the class, which would be the more accurate -- not to the class, general counsel to the administrative fund, it would really be a much more accurate description of his role than class counsel.

I think we're focusing on a label and a label that reflects the focus of the advisory committee on the role of attorneys, pre-judgment. And the fact that people ought to know what attorneys are getting in terms of evaluating the disinterested nature of the service that they're giving and their advise and positions on various issues including the reasonableness of the settlement, how they formulate objections and how they resolve those objections.

I think that that was the concern of Congress. But look, you could -- I'm just telling you my preliminary view. I think that calling, you know, calling Mr. Neuborne plaintiff's class counsel is just a meaningless title that doesn't even accurately describe his role once the final judgment was entered.

MR. SWIFT: Well, Your Honor --

THE COURT: I mean, I don't even -- I'm not making a big issue out of this, Mr. Swift.

MR. SWIFT: It's Bob Swift, again. I --

THE COURT: I'm not making it -- I don't even know what your -- what it means to say you're class counsel and then you self-designate yourself as representing actually a subclass. I don't know what that means in a post-judgment context. You were class counsel. I designated you as such. Why? I don't. I don't mean you in particular, but why I even bothered to designate anybody class counsel at the time I did wasn't entirely clear to me. But I was a novice in this area and people said that's what you do.

MR. SWIFT: Your Honor, as I mentioned, I do believe that class notice is required.

THE COURT: I know.

MR. SWIFT: We may simply disagree on that --

THE COURT: Well, do you want me to give notice to whom and how much should I spend or are there no limits? That's what I'm asking you. I'm willing to listen.

MR. SWIFT: I'm trying to answer.

THE COURT: Okay.

MR. SWIFT: My answer is that we need to see and find out from people that have participated in the notice programs what we might do, whether we can formulate a way of sending out notice that is cost effective and likely to reach the largest number of people. I don't want to spend money unnecessarily, but this is four-million-plus request.

THE COURT: I understand that.

MR. SWIFT: There are and will be other fee petitions. And --

THE COURT: As far as I know there's -- I'm not sure how many others there'll be, but my only knowledge of any possible subsequent other fee petitions is Mr. Weiss and I don't know -- I can't imagine that his post-judgment hours will amount to a fraction of what Mr. Neuborne's does.

MR. SWIFT: Well, I'm aware of --

THE COURT: And this reminds me, by the way, you know, you wanted me to set a date for him to file, or other who may, to file their claims. My basic practical view of life is that if there's someone who believes that you owe him money and he is not bothering you, you don't call him up and ask him to send a bill. And basically --

MR. SWIFT: Well, except that Your Honor --

THE COURT: And basically, maybe he'll -- maybe he's sufficiently distracted with other things that I will have distributed all the money before he wakes up. Now, if you think it's in the class's interest for me to say, hey, file your application. I'm willing to consider it.

MR. SWIFT: Well, first of all, we need to know how -- what that mode might be, how the cost can be handled. And again, this is a matter I think that maybe the magistrate could participate in.

THE COURT: Well, and you know, as I said, I'm willing to hear reasonable suggestions. I'm not -- I'm basically a very pragmatic --

MR. SWIFT: I understand. But the one thing --

THE COURT: You know, to eliminate an issue, I'm willing to consider reasonable proposals. But, you know, fundamentally if I'm wrong -- I'm willing to consider reasonable proposals. But the world wouldn't come to an end if I was wrong because they'll just --

MR. SWIFT: Your Honor --

THE COURT: -- reverse and say what I should have done and then we'll do it again. But I just think that you ought to really seriously think about whether this is all very practical.

MR. SWIFT: Well --

THE COURT: And if you want to press it, give me practical suggestions; if as you say, we can do this some reasonable degree of expense.

MR. SWIFT: Well, I was looking for an order from Your Honor which would be consistent with the orders you had issued back in 2000, which is that all counsel need to file petitions by a certain date.

THE COURT: I know. But I, you know, I've told you the reason why. But if you want to press it, I'll do it. I mean, I've told you the reason that --

MR. SWIFT: Secondly, Your Honor --

THE COURT: Do you want me to go against my basic common sense for you that if people who think you owe them money don't bother you, you don't bother them?

MR. SWIFT: I --

THE COURT: Do you want me to call them up? Particularly, since, you know, money is earning interest.

MR. SWIFT: No. I --

THE COURT: So, I'll do it. But, you know, the reality is, is that I can't imagine that we're talking about an amount that's, you know, if it's 10 percent of Mr. Neuborne's bill, it would be --

MR. SWIFT: We need to finalize this process. And that would be consistent with what -- an order Your Honor had entered back in the year 2000.

THE COURT: Well, then I'll be happy to oblige you. If you want to send in an order, I'll be happy to --

MR. SWIFT: Secondly, Your Honor's order earlier had required that detailed time reports be filed of record and I don't believe that's been the case.

THE COURT: Where? Now?

MR. SWIFT: Well, earlier you had required that all time reports be filed of record and they were. And they were not maintained confidentially, they were just part of the docket.

THE COURT: Right. So that --

MR. SWIFT: I think that would be -- or that should be done here as well. I don't say that for any personal reason or whatever. I think it should just be a matter of record.

THE COURT: Okay.

MR. SWIFT: And I would like Your Honor to authorize me to talk to the people that have given class notice in the past, so that I can try to put together something might pass muster with Your Honor about --

THE COURT: Go ahead.

MR. SWIFT: -- class notice.

THE COURT: Go ahead.

MR. SWIFT: And --

MR. ISSACHAROFF: Your Honor, this is Sam Issacharoff. I have one request if we're going to go down this road. And that is that Mr. Swift request from them as well what it would cost to get better notice than the extraordinary news coverage that this has gotten already.

THE COURT: Well, you could ask -- you know, you're all free to talk with them. I wouldn't -- I don't know that you need my permission. And if anybody says they don't want to talk to you, who I still have control over, I'll be happy to tell them to talk to you.

MR. ISSACHAROFF: All right. Last on this particular subject, I noticed that Mr. Neuborne's fee petition and all the reasons in support of it were put on the website.

THE COURT: Right.

MR. ISSACHAROFF: I don't know if that was with

Your Honor's permission or without.

THE COURT: It was.

MR. ISSACHAROFF: Well, I must --

THE COURT: It was intended --

MR. ISSACHAROFF: -- say I'm --

THE COURT: It was intended to deal with the -- well, let me put it this way. I don't remember whether it was pre he did it or after, but it certainly would be consistent with dealing with the notice issue. I think one of the issues was -- one of the suggestions was that that be done.

MR. SWIFT: Your Honor, my position is that if you're going to give notice, it needs to be a neutral notice. His fee petition is anything but --

THE COURT: If that's what -- prepare whatever you want me to say.

MR. SWIFT: No, no, but what I -- but if you put a fee petition from him on the website, then you also have to put on the website the opposition thereto or people looking at it won't have a clue.

THE COURT: Good. This is another reason why you should give it to me on one piece paper, so that all of these, you know, I don't how -- there must be at least 10 to 12 documents floating around. That will only confuse people. I'll be happy to put your opposition up when you -- is it all right? If you want, I'll put all these various pieces of paper up, but I suggest that you put it all on one document and I'll put it up.

MR. SWIFT: Your Honor, has covered a lot of ground and I don't think it's productive to comment on it. But for example, you mentioned nobody was willing to give up 8,000 hours and I think that's true. But that isn't -- the question was -- the question is was anyone, such as myself, willing to give up time? And I did. And I believe others probably gave some time. And so, you get into the issue that Your Honor wrote about and raised earlier. And so I think we're going to have to go down that road.

THE COURT: Well, you get into the issue of -- look, my recollection is that you are -- you did file an opposition to the Dubbin-Weiss fee application without anybody asking you to. But as a general proposition, I don't think that huge amounts of time would have been available, but that gets to the second aspect of this and that is --

MR. SWIFT: But if Your Honor --

THE COURT: -- the quality of --

MR. SWIFT: Okay.

THE COURT: -- Mr. Neuborne's representation.

MR. SWIFT: Well --

THE COURT: And I'll just give you an example in this particular, Mr. Neuborne said that Blum v. Stenson supported his position that it didn't matter what his overhead was. You didn't say, Judge, I read that case and it doesn't -- it's not dispositive. I mean, basically, it seems to me that I think -- look, just to say it blunt, I think he's a much better lawyer than you are on respective legal issues. You may be a very fine class-action lawyer. But as a lawyer-lawyer, I don't think that --

MR. SWIFT: But, Your Honor --

THE COURT: I think that there are very few people in his league and I think I've gotten the best.

MR. SWIFT: Well, that's fine, Your Honor. But one of the jokes that we made during the liability phase, which was far more difficult than this phase --

THE COURT: No, no. As everyone said when the case settled, "Judge this was the easy part." And they were right.

MR. SWIFT: Well, what I -- you know, the whole lawyer -- the joke about you put two lawyers in a room, you get three opinions. Our joke was, you put Burt in a room, you get -- all alone, by himself, you get three opinions.

THE COURT: Well --

MR. SWIFT: It's sometimes productive and it's sometimes not.

THE COURT: Well, this is basically my own judgment.

MR. SWIFT: I understand --

MR. DUBBIN: Your Honor, I understand these are preliminary views of yours. And can I just address them in my next filing rather than --

THE COURT: Absolutely. And what I wanted -- what I want from you is some notion of, you know, we've been talking about setting things down for a hearing. I want to know what actually we're talking about.

MR. DUBBIN: Well, I think -- it's obviously --

THE COURT: You don't have to tell me now, but that's basically --

MR. DUBBIN: No, no, I understand. It's a major issue of principle, but I think we can simultaneously address that and the second one. I think it's a good idea to try to narrow the other issues. That's worth pursuing, I would certainly agree to do that at the same time. But as you know not without prejudice to my right to address the overriding issue.

THE COURT: I didn't -- I thought I made it clear that they were two separate and distinct --

MR. DUBBIN: No, no, I understand. I'm just saying I will address those -- I want to make sure it's okay that I address those in the filing and that I have the ability to address the Blum v. Stenson issue as well. If I had adopted Mr. Swift's point on that in my original filing -- because my original filing, I did quickly. And the later one, you know, I did not address that one in particular. I had more than enough to do on my own. But I just wanted to make sure that that was okay.

THE COURT: Okay.

MR. ISSACHAROFF: Your Honor, if I can suggest perhaps how we should -- can proceed most expeditiously. I think that it's not worth taking the time of the Court on the details of, for example, was Mr. Neuborne on leave in 2000? Did he really spend the hours he claims was spent? And that that, I understand, will be referred to the magistrate.

THE COURT: To try and -- for you to try and work out. And there are other, you now, there are other what I would call -- they involve micro issues as opposed to macro issues on whether --

MR. DUBBIN: Well, the issue --

THE COURT: -- or not he should have billed for time that he spoke with Michael Baisler(phonetic). I don't know. There's a whole collection of what I would call, you know, these micro issues, which I think --

MR. ISSACHAROFF: I think, Your Honor --

THE COURT: -- ought to be -- which I think should be resolvable without us having to litigate them. And that way we can focus on the larger issues.

MR. ISSACHAROFF: And I think that there are only two larger issues that remain. One is whether Mr. Neuborne is estopped in some sense from seeking fees, which is the heart of the objection --

THE COURT: I don't --

MR. ISSACHAROFF: -- from Mr. Swift and --

THE COURT: I don't believe that he was estopped.

MR. ISSACHAROFF: And the other one is --

THE COURT: I don't --

MR. ISSACHAROFF: -- the extensive one on how you calculate his hourly rate --

THE COURT: Right.

MR. ISSACHAROFF: -- given the fact that he's not primarily an academic.

THE COURT: Exactly. And doesn't have the expenses that someone who is a partner in a law firm has. You know, it seems to me to be on it's face to -- if I'm looking for what is a fair and reasonable fee here, it seems to me to be relevant. And I may not --

MR. ISSACHAROFF: Your Honor, we'll provide you briefing on that point.

THE COURT: And also --

MR. ISSACHAROFF: And the briefing I think will show that the case law says that one looks to the market equivalence and not to the particulars of the individual lawyer.

THE COURT: Well --

MR. ISSACHAROFF: And Blum v. Stenson is stance at sort of symbol for that proposition. But that we --

THE COURT: Well, if it's symbol for that --

MR. ISSACHAROFF: -- could produce briefing on.

THE COURT: If it's a symbol, I don't want to argue with it. As I read the case, it's a symbol for it in a very -- in a context in which Justice Powell relied heavily on the legislative history. And I also think that it may have been influenced by the fact that these were not people who were guaranteed payment regardless of result.

But I'm not resolving it nor am I saying that if it's 30 percent -- I'm just picking a number out. When I was at a law firm, associates were always with the view that one-third of what was billed, whoever billed for us, an hour was for overhead, one-third was for us, and one-third was for profit. But I don't know what it is in terms of partners. But it doesn't necessarily mean that I'm -- that that's some sort of an absolute. I just think it's a relevant factor, at least intuitively.

MR. ISSACHAROFF: We'll provide you briefing on --

THE COURT: In fact, I found the argument of the, I guess it was the defendants in Blum v. Stenson, intuitively persuasive. But I could understand the decision rests -- which rests entirely on the history -- legislative history of the Civil Rights Act.

MR. ISSACHAROFF: We'll provide cases in the non-statutory setting for this point, Your Honor.

THE COURT: Okay.

MR. ISSACHAROFF: But if that's the case, then I think that the only thing that remains for a hearing then is straight-forward legal argument on the estoppel and on the Blum v. Stenson. And that the other matters should be resolvable before the magistrate --

THE COURT: And if they're not --

MR. ISSACHAROFF: -- by agreement.

THE COURT: And if they're not, we'll have to deal with them.

MR. DUBBIN: Well, Your Honor, I'm not prepared to agree to Mr. Issacharoff's proposal as such. First of all, there maybe some factual issues that the magistrate can't resolve.

THE COURT: That's right, I said that. I just said that.

MR. DUBBIN: And --

THE COURT: And whatever you can't resolve, I'll have to deal with.

MR. DUBBIN: -- secondly, you know, there are -- there will be and will remain some issues maybe that Your Honor doesn't want oral argument on because you've already reached a conclusion. But I don't want to be precluded from raising any legal arguments at a hearing.

THE COURT: Well, I -- as long as you tell me you want a hearing on the law, that's fine. I just want to -- you can raise what you want at such a hearing on the law, but I just wanted to know that it's going to be a hearing on the law as opposed to some sort of other kind of a hearing.

MR. ISSACHAROFF: What my understanding was, Your Honor, that you wanted us to address in our filing, due in 14 days, what kind of a hearing we think is necessary.

THE COURT: You could do that too, yes. But I think you should -- what I want you to do most of all was to have in one concise place, your arguments.

MR. ISSACHAROFF: Understood. Understood.

THE COURT: Okay.

Anything else?

MR. DUBBIN: Not from here.

THE COURT: Okay.

MR. ISSACHAROFF: Your Honor, can we, threw this call, ask the court reporter for a transcript of this status conference?

THE COURT: Yes. You want a --

MR. ISSACHAROFF: You'll want to have our e-mails.

THE COURT: Okay. Why don't you give the e-mails right now so that the -- so she can take it down.

MR. ISSACHAROFF: This is sam Issacharoff. My email is si13@nyu.edu and I would like a transcript whenever you can get it to me.

MR. DUBBIN: Hi. This is Sam Dubbin. My email is sdubbin@dubbinkravetz.com.

MR. SWIFT: My name is Robert Swift and my email --

MR. DUBBIN: I'm sorry. I would like a transcript. I'm sorry for interrupting.

MR. SWIFT: -- is rswift@kohnswift. Kohn is spelled K-O-H-N, Swift, S-W-I-F-T .com and I'd like a copy of the transcript as well.

THE COURT: Okay. And if you like, I actually have a memo on judicial estoppel. It wasn't prepared for this case. It was prepared by my law clerk for another case where I actually never had any occasion to write on it. But I'll look at it and if I think it's relevant, I'll have to re-read, I'll be happy to send you a copy. But --

MR. SWIFT: Thank you.

THE COURT: -- the bottom line is there has to be judicial opinion relying on it. And certainly none of my opinions relied on any notion that he wasn't going to be paid post -- for his post-judgment work. And I don't believe that any court of appeals decision turned on that fact. But, you know, that's my view of it. And, so that's it.

MR. SWIFT: Your Honor, before we leave this. You mentioned that in your appointment of Mr. Neuborne that in effect it was a dual appointment. One, to represent the class and secondly to represent the Court in upholding decisions.

THE COURT: You can -- actually, it would be easier if you read -- I actually set it all out in writing and what I said here actually supplemented it. I, in my view, whenever I took any action or made any decision, I felt comfortable on calling on Mr. Neuborne because I regarded him as not really a part of the -- of my, you know, of me and the special master, but somebody who had represented the class who was independent. Who, in fact, gave me views that I didn't always accept, but I wanted it because I thought that he was a reasonable person to look to, to look after the interest of the class.

But fundamentally, he was a part of the administration of the program. And he was, essentially, counsel as I said in this opinion. I viewed him, most of all, as counsel to the distribution process. And I viewed him as particularly qualified, not only because of his extraordinary legal ability, but because of his thoughtfulness and the time and effort he had devoted on behalf of the members of the class for nothing.

And even in that capacity, by the way, he saved the class money. Because aside from the fact that there were lawyers who were willing to litigate this case for nothing, which undermined one of the policy reasons for why you wouldn't have to pay something in the neighborhood of a contingency fee. He also litigated the legal fees application. And the bottom line was is that we paid legal fees that were half of what were requested. And, you know, I may be cynical, but I think that it's not all together irrelevant that Mr. Neuborne basically opposed Mr. Dubbin's application and he opposed yours. It gives you a double incentive to pay him back.

MR. SWIFT: Your Honor, this is Bob Swift. And I must just put on the record that I don't agree with that.

THE COURT: I understand.

MR. SWIFT: And to some extent, I think it's an attack on me.

THE COURT: Well, that's --

MR. DUBBIN: Your Honor, for that point, let me just say that I represent holocaust survivors. They're class members. They, you know, heard Mr. Neuborne refer to himself as pro bono numerous times throughout this process.

THE COURT: I understand that.

MR. DUBBIN: But never until, you know, he filed --

THE COURT: But --

MR. DUBBIN: -- a request to --

THE COURT: We're going over -- the question is, what is the legal consequence in that?

MR. DUBBIN: I understand that. But in terms of the remark you just made, you know, Bob felt the need to respond to it and frankly I agree that --

THE COURT: Okay. It's a fact that basically he opposed your fee applications and your opposing his. And it doesn't matter, it makes it all --

MR. DUBBIN: Your Honor, the clients are opposing his fee request.

THE COURT: -- the more -- it makes you all the more qualified to appear here and why I don't think I need, you know, to spend a fortune on notice to notify the class when there are people here, whatever their motives are, but they have them, to contest his fee.

MR. SWIFT: Your Honor, I think if we get into motives, then we're going down --

THE COURT: I know. I'm sorry I got into it. I think that we ought to argue this -- what your motives are, are not relevant to me because I intend to decide this based on what I think is the right result. And all of my rulings pretty much are going to be subject to review de novo by the court of appeals.

MR. SWIFT: One thing I do know so far from dealing with Mr. Issacharoff is he is going to quote that extensively in his papers and I deeply resent that.

THE COURT: Well --

MR. SWIFT: Partly, because I do many human rights. I represent many Jewish clients; although, I'm not Jewish myself. And it's just deeply resentful.

THE COURT: Well --

MR. DUBBIN: I would just add, Your Honor, again, and I'll address this in my papers, but I do think that one of the reasons for the notice is that, you know, the Court may not -- you've expressed your preliminary views on this, but the Court may not have an appreciation for how the class members feel.

THE COURT: I do. I do know how they feel. And I know that Mr. Swift eluded to it in his, I think in his last letter how, you know, the basic opposition of class members to paying lawyers, period. They were opposed to it. They don't want it.

MR. DUBBIN: Let me just add to that point, Your Honor. I did one of these cases in Miami and the class members did not oppose paying the lawyers in that case. In fact, not only those who were involved, but others who were not named, you know, were very appreciative of the work that was done to have an airing of their legitimate grievances and a resolution of their rights in the context that that done. There was virtually no opposition of the fees in that case, so I don't actually agree that as a general proposition survivors are against lawyers getting paid for advancing their rights and interests.

THE COURT: I thought that somebody appeared to oppose your application in Florida.

MR. DUBBIN: A very small number of non --

THE COURT: I know.

MR. DUBBIN: -- of absent class members opposed it. Professor Neuborne, as you know, appeared to oppose it on behalf of 11 Hungarians and later withdrew his opposition.

MR. SWIFT: Your Honor, I like to move to strike that portion of the transcript that deals with ascribing motives to counsel.

THE COURT: I'm not -- there's no such thing as striking a transcript. The transcript is what it is. I don't alter it. I'll be happy to apologize to you for it, but I don't change transcripts. You know, when you strike testimony in front of a jury that means if the jury should ask to have the testimony read back, they don't get what was stricken or had told to ignore. But I don't tamper with transcripts.

Okay. I will -- so how should we leave it in terms of our next get together?

MR. SWIFT: Your Honor, this is Bob Swift. I'm going to submit a proposed order along the lines --

THE COURT: Okay.

MR. SWIFT: -- of what you suggested.

THE COURT: Okay.

MR. SWIFT: And then I think the next thing is for us to submit briefs on the legal points. And in addition, to make an appointment with the magistrate --

THE COURT: Okay.

MR. SWIFT: -- so that we can discuss some of the factual issues.

THE COURT: Okay. Should we set this down for some sort of a general status conference in a period of time or should we just leave it?

MR. SWIFT: Well, there's really only three counsel involved in this and I think we're grownup enough that we can probably ask Your Honor to schedule something as soon as we're ready.

THE COURT: Okay.

MR. ISSACHAROFF: Well, Your Honor, as I understand it, we have until March 17th to submit the consolidated claims that we have or defenses or whatever they may be, objections, and that that's the next step. But I think that immediately after the 17th, we should schedule a hearing before the magistrate on whatever issues remain outstanding.

THE COURT: Well, the magistrate -- I don't control the magistrate's schedule. You contact him and --

MR. ISSACHAROFF: Okay.

THE COURT: -- he'll set it down when he, you know, at a time that's convenient for him.

All right. Have a nice weekend everybody.

(Parties thank the Court.)

(Proceedings concluded at 5:35 p.m.)

I, CHRISTINE FIORE, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

____

Christine Fiore